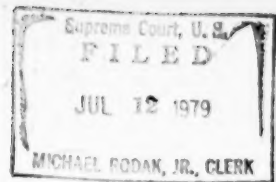


78-6839



In the
SUPREME COURT OF THE UNITED STATES
1978 Term

No. 78-

EDDIE GORDON,
Petitioner,
-against-
THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner seeks a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Department, to review the judgment of the Supreme Court, Kings County rendered on July 29, 1977, convicting him, upon his plea of guilty, of the crime of Manslaughter in the First Degree and sentencing him thereon to a term of imprisonment of eight and one-third to twenty-five years. The Honorable Hyman J. Barshay presided at trial and imposed sentence.

OPINIONS BELOW

The Appellate Division of the Supreme Court of the State of New York affirmed the judgment of conviction in an opinion

unofficially reported at 413 N.Y.S.2d 29 (1979). On the 19th of March, 1979, leave to appeal to the Court of Appeals was denied by the Honorable Jacob D. Fuchsberg, Associate Judge. (46 NY2d 1080) The written opinion of the Supreme Court, Kings County is not reported.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Under the circumstances of this case, where petitioner was identified six days before as the perpetrator by the only live victim of the shooting, where information was received approximately an hour and a half before the arrest that the petitioner was finally located at a specific address and where the police officers were denied entry to that premises after they identified themselves, were these officers, having probable cause to arrest, justified in forcibly entering the apartment without a warrant to effect petitioner's arrest and to seize the gun hidden under the mattress in that apartment as incident to that arrest.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV and XIV

STATEMENT OF THE CASE

EDDIE GORDON, petitioner herein, was accused by Kings County Indictment Number 4037/1976 of the crimes of Murder in the Second Degree (2 counts, felony and common law),

Attempted Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree, it being alleged that in the early morning hours of December 15, 1976, petitioner and two others unlawfully entered the apartment of Ignacia Torruella and forcibly stole property from both Torruella and one James Lawrence. In the course of the commission of the this crime, Torruella and Lawrence were both shot in the head as they lay tied up on a bed. Lawrence died of his wounds that same day; Torruella was hospitalized and eventually recovered.

On June 28, 1977, a hearing was held on petitioner's motion to suppress the gun found hidden under the mattress during the limited search conducted incident to his arrest.

Detective Arthur Walsh, assigned to the 12th Homicide Zone, testified that, on December 15, 1976, he was called to investigate the homicide of one James Lawrence. In the course of this investigation, he went to Brookdale Hospital on December 15th to interview one Ignacia Torruella who had been shot in the head along with James Lawrence. Torruella was shown a series of photographs and identified Eddie Gordon as the man who had shot him by picking his photo from a photographic display. He informed Detective Walsh that he knew Gordon approximately one year by his "street name" Eddie. Torruella related that petitioner and others had entered his apartment, bound him and Lawrence, searched the apartment and that afterwards Gordon returned and shot the deceased and Torruella. After his conversation with Torruella, Walsh

commenced the effort to locate Eddie Gordon.

On the morning of December 21, 1976, Detective Walsh received a phone call from the mother of one Diane McMoore. She informed him that Eddie Gordon was at her daughter's apartment, located at 2989 Fulton Street in Brooklyn. Walsh, accompanied by Sergeant Lanzetta, and Detectives Jacobson and Lasky immediately proceeded to Ms. McMoore's apartment. They knocked on the door and identified themselves as police officers. A female voice responded and told the officers to wait. They did so and, while standing outside, heard the sounds of milling around from inside the apartment. After a pause, the officers knocked and identified themselves again. Receiving no response, the door was pushed in.

After entering the apartment, the detectives moved toward the front of the house. Eddie Gordon was found in a closet wearing only his undershorts. He was informed that he was under arrest and was told to get dressed. Petitioner and the detectives went into the bedroom where his clothes were lying on the floor next to the bed. As Gordon was about to sit down on the bed and put on his socks, Detective Jacobson ordered him to stop, flipped the mattress and found the gun.

The defense produced two witnesses, Eddie Gordon and Diane McMoore, who recounted their versions of the arrest. At the conclusion of the hearing, petitioner's motion to suppress the gun was denied by the court. In a detailed opinion, the court concluded that there was clear and convincing evidence of probable cause to arrest petitioner

without a warrant and the ensuing limited search was lawful as incident to a valid arrest.

After the court's decision on petitioner's suppression motion, Eddie Gordon offered to plead guilty to Manslaughter in the First Degree to cover the entire indictment. During the course of his allocution, petitioner admitted entering Mr. Torruella's apartment armed with a gun. He informed the court that he was prepared to shoot anyone who might have arrived at the apartment during the robbery. Gordon admitted that both victims of the robbery were shot during the course of the crime and that he left the apartment "on the assumption they were dead". Thereafter, the plea was accepted.

On July 29, 1977, petitioner appeared before the court for sentencing. At that time, the court indicated that it had read the probation report thoroughly. Following statements by both counsel, the court sentenced Eddie Gordon to a minimum of eight and one-third years imprisonment and a maximum of twenty-five years.

The judgment of conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, Second Department, and leave to appeal to the Court of Appeals has been denied. Petitioner now seeks a writ of certiorari to review the question of whether considering the existence of probable cause and the exigent circumstances, the police officers' actions in entering an apartment where he was staying without a warrant was a violation of his rights under the Fourth and Fourteenth Amendments.

ARGUMENT

THE COURT BELOW CORRECTLY CONCLUDED THAT THE POLICE HAD PROBABLE CAUSE TO ENTER THE APARTMENT WHERE PETITIONER WAS FOUND AND ARRESTED AND THAT THE EXIGENT CIRCUMSTANCES PRESENTED HEREIN JUSTIFIED THIS COURSE OF ACTION DESPITE THE ABSENCE OF A WARRANT. THERE BEING NO SUBSTANTIAL FEDERAL QUESTION TO BE RESOLVED, CERTIORARI SHOULD BE DENIED IN ALL RESPECTS.

Petitioner's challenge to the legality of his arrest and the subsequent seizure of the gun raises the issue of whether a police officer who has probable cause to arrest and who, additionally has received information that a sought after suspect is at a specific location, may forcibly enter that premises after being denied entry to effect an arrest without a warrant. While respondent recognizes that under certain circumstances the warrantless intrusion into a home to effect an arrest may violate a suspect's Fourth Amendment rights (see, e.g., United States v. Reed, 572 F.2d 412 [2d Cir. 1978]; United States v. Jarvis, 560 F.2d 494 [2d Cir. 1977], cert. denied, 435 U.S. 934, [1978]), the case at bar is not such a case.

It is beyond cavil that the perimeters of "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest" (Gerstein v. Pugh, 420 U.S. 103, 113 n.13 [1975]) have yet to be precisely defined by this Court. United States v. Santana, 427 U.S. 38 [1976]; United States v. Watson, 423 U.S. 411 [1976]; Coolidge v. New Hampshire, 403 U.S. 443 [1971]). Nonetheless, it is equally uncontested that this Court would not invalidate

an arrest based upon probable cause for the sole reason that the law enforcement official did not obtain a warrant. (Gerstein v. Pugh, supra, 420 U.S. at 113; Ker v. California, 374 U.S. 23 [1963]; Draper v. United States, 358 U.S. 307 [1959]). Nor would this Court void an arrest where exigent circumstances made a warrantless entry the only reasonable means of effecting such arrest. (United States v. Santana, supra; Warden v. Hayden, 387 U.S. 294 [1967]). It is precisely within these already well-recognized exceptions to the warrant requirement that the factual pattern presented herein fits.

Although in the absence of a United States Supreme Court pronouncement, "the law of the state where an arrest without warrant takes place determines its validity" (United States v. Di Re, 332 U.S. 581, 589 [1948]; See also United States v. Watson, supra, 423 U.S. at 420 n.8), even when considered without the benefit of the rationale of People v. Payton, and People v. Riddick, (45 NY2d 300, 408 N.Y.S.2d 387, 380 N.E.2d 217 (1978); probable jurisdiction noted sub nom. Payton v. New York and Riddick v. New York, ___ U.S. ___, 99 S.Ct. 718 (1978) Nos. 78-5420, 78-5421), under the well-established exception of exigent circumstances, the police conduct in the instant case clearly passes constitutional muster.

In the case at bar, the detectives were investigating the commission of a violent murder. On the day of the incident, the sole remaining victim of the shooting conclusively identified the petitioner as the person who shot him and

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killed James Lawrence. Armed with the information that the perpetrator was named Eddie and came from the East New York area of Brooklyn, the police began an unfruitful search for his location. At approximately 9:00 a.m. on the twenty-first of December, six days after the identification, Detective Walsh received a tip from a highly reliable source that the Eddie Gordon was at 2989 Fulton Street in Brooklyn. Within a hour and a half after the receipt of this information, a detail of officers was present at the Fulton Street address. The officers knocked and identified themselves twice. Receiving no response the second time, they forcibly entered the apartment where petitioner was found in the closet.

As an aid in determining whether the circumstances are sufficiently compelling to necessitate a warrantless intrusion in the home, the District of Columbia Circuit has listed a number of factors gleaned from this Court's decisions to be considered when evaluating the constitutionality of a warrantless arrest. Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970). These considerations, recognized and adopted by five other circuits, include:

...commission of a grave offense, belief that the suspect is armed, probable cause to believe the suspect has committed the crime, suspicion that suspect is on the premises, likelihood of escape if delay ensues, and peaceful entry by the police. United States v. Jarvis, 560 F.2d 464, 498 (2d Cir. 1977).

See also, Salvador v. United States, 505 F.2d 1346 (8th Cir. 1974); United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970).

All of the cited considerations were present in this

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case but one. A grave offense was obviously involved here and there was also a strong belief that petitioner was armed. As conceded by petitioner in the courts below, there was probable cause to believe that he had committed the crime. There was a strong suspicion that Gordon was at the premises to be entered and a strong likelihood that he would leave the apartment and continue to elude the police were any delay to ensue. The only consideration not present was that of a peaceful entry. When viewed in the totality of circumstances, however, the manner of entry was eminently reasonable. The police announced their identity at the door and were told to wait. During the period of waiting, they heard sounds of milling about inside the apartment. Considering the likelihood of the suspect being armed, the forcible entry was reasonable. Any further delay would have enhanced the possibility of a shootout with serious injuries to those within and without the apartment.

Moreover, the officers went to 2989 Fulton Street with the sole intent of effecting a felony arrest. No general search of the premises was intended nor was one undertaken. The only seizure of property was the result of a search incident to a lawful arrest. Clearly, once petitioner sat on the bed, anything hidden therein was obviously within the "grabbable" area and under these facts, the officers were entirely justified in conducting this limited search for their own safety. (Chimel v. California, 395 U.S. 752 [1969]).

Although not the classic "hot pursuit" situation (See Johnson v. United States, 33 U.S. 10 [1948]), nevertheless,

the factual situation presented herein is tantamount to the type of exigency justifying immediate police action without a warrant. (See United States v. Santana, *supra*; United States v. Price, 345 F.2d 256 [2d Cir. 1965]); People v. Hodge, 44 NY2d 553, 406 N.Y.S.2d 268, 377 N.E.2d 721 [1978]). The circumstances in the case at bar do not raise the more difficult issue presented to this Court in Payton and Riddick, namely whether a police officer who has probable cause to arrest may enter the home of the suspect to effect the arrest in the absence of exigent circumstances. Accordingly, the case at bar presents no substantial federal question warranting the granting of petitioner's application for a writ of certiorari.

In the event that this Court determines that the factual pattern presented in the case at bar was not sufficiently critical to warrant the immediate arrest of this murder suspect without a warrant, we respectfully request that any decision on this petition be stayed until this Court's determination upon the reargument of Payton and Riddick.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD
BE DENIED IN ALL RESPECTS.

Dated: Brooklyn, New York
July, 1979

Respectfully submitted,

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* The writer is indebted to Assistant District Attorney Adrian Mecz who prepared the brief submitted to the Appellate Division of the Supreme Court of the State of New York, Second Department.